IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1946

## No. 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
*Appellant,*

*vs.*

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, *et al.*,
*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

## REPLY BRIEF FOR AIRCRAFT & DIESEL EQUIPMENT CORPORATION, APPELLANT.


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## TABLE OF CONTENTS.


ARGUMENT PAGE

Appellees contentions ..... 2

The Statute ..... 3, 4

Pertinent Facts ..... 5

ANALYSIS OF PRINCIPAL CASES

(a) Macauley v. Waterman S. S. Co. 327 U. S. 540, analyzed ..... 6-8

(b) Coffman v. Breeze, 323 U. S. 316, analyzed ..... 8-11

(c) United States v. Ruzicka, 67 S. Ct. 207, analyzed ..... 11-14

EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE DOES NOT APPLY ..... 15-19

(a) Doctrine of Kuykendall case ..... 17

(b) Doctrine of Myers case ..... 17

(c) Doctrine of Phillip v. Commissioner ..... 17, 18

(d) Refunds discussed: None in Renegotiation Act. 18, 19

(e) Inadequacy of interest ..... 19

(f) Board must certify refunds ..... 19

"Absence of judicial review," "multiplicity of suits," payment prior to completion of administrative process, . . . reference to discussion of Coffman, Macauley and Ruzicka cases ..... 19-20

Act unconstitutional in toto ..... 20-24

(a) Standards discussed ..... 20-22

(b) Retroactivity discussed ..... 22

(c) Separability clause discussed ..... 23

PAGE

Inadequacy of Remedy at Law ..... 24

(a). Suits against customers present difficult problems where petition is pending in The Tax Court, uncertainty of "remedy" ..... 24

Appellant need not sue customers because of others'. wrongdoing ..... 27, 28

This is not a suit against the United States ..... 28-33

(1) Appellants cases discussed.

(a) Mines Safety Co. v. Forrestal, 326 U. S. 371 ... 28

(b) Minnesota v. Hitchcock, 185 U. S. 373 ..... 29

(c) Louisiana v. McAdoo, 234 U. S. 627 ..... 29

(d) Belknap v. Schild, 161 U. S. 10 ..... 29, 30

(2) Appellees sued as individuals cannot justify, if act be unconstitutional ..... 30-33

Doctrine of adoption of War Department's factors discussed ..... 33-34

Notion that because United States may sue there is an adequate remedy necessarily available to appellant ..... 34-35

Conclusion ..... 35-36

## Table of Cases.

PAGE

Addison v. Holly Hill Co., 322 U. S. 607 ..... 23

American Federation of Labor v. Watson, 327 U. S. 582 ..... 9

Belknap v. Schild, 161 U. S. 10 ..... 29

Brady v. Roosevelt S. S. Co., 317 U. S. 575 ..... 10

Carter v. Carter Coal Co., 298 U. S. 238 ..... 23, 24

Coffman v. Breeze Corporations, 323 U. S. 316 ..... 5, 8, 9, 10, 11, 15, 20

Columbia System v. United States, 316 U. S. 407 ..... 9

Euclid v. Amkler Co., 272 U. S. 365 ..... 24

Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134 ..... 14

Ford Co. v. Dept. of Treasury, 323 U. S. 459 ..... 32

Hirabayshi v. U. S., 320 U. S. 81 ..... 33, 34

Ickes v. Fox, et al., 300 U. S. 82 ..... 31

Louisiana v. McAdoo, 234 U. S. 627 ..... 29

Lumley v. Gye, 2 El. & Bl. 216 ..... 10

Macauley v. Waterman S. S. Corp., 327 U. S. 540 ..... 5, 6, 7, 15, 20

Mine Safety Co. v. Forrestal, 326 U. S. 371 ..... 28, 32

Minnesota v. Hitchcock, 185 U. S. 373 ..... 29

Myers v. Bethlehem Corp., 303 U. S. 41 ..... 17

National Broadcasting Co. v. United States, 319 U. S. 190 ..... 21

Natural Gas Pipeline Co. v. Slattery, 302 U. S. 300 .. 24

New York, State of (No. 1) ex parte, 256 U. S. 490 .... 28

Pacific Tel. Co. v. Kuykendall, 265 U. S. 196 .. 15, 16, 17, 24

PAGE

Pennsylvania v. West Virginia, 262 U. S. 553..... 24
Philadelphia Co. v. Stimson, 223 U. S. 605.....30, 31
Phillips v. Commissioner, 283 U. S. 589.....17, 18
Pierce v. Society of Sisters, 268 U. S. 510..... 24
Porter v. Investors Syndicate, 286 U. S. 461.....7, 17, 24
St. Louis & R. Co. v. Public Comm., 279 U. S. 560..... 24
Schechter Corp. v. United States, 295 U. S. 495..... 20
Sloan Shipyards v. Emergency Fleet Corp., 258 U. S. 549 ..... 11
Small Co. v. Am. Sugar Ref. Co., 167 U. S. 33..... 20
Spaulding v. Douglas Aircraft Co., 154 Fed. 2d 419.. 24
Standard Chem. & M. Corp. v. Waugh Chem. etc., 231 N. Y. 51, 131 N.E. 566..... 20
United States v. Ruzicka, 67 S. Ct. 207..... .....6, 7, 11, 12, 13, 14, 15, 20
United States v. Morgan, 307 U. S. 183..... 14
Waite v. Macy, 246 U. S. 606..... 22

STATUTES CITED.

Third Deficiency Appropriations Act, 1946.

AUTHORITIES CITED.

89 Congressional Record 9930..... 18

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## REPLY BRIEF FOR AIRCRAFT & DIESEL EQUIPMENT CORPORATION, APPELLANT.

### ARGUMENT.

In this action, appellant seeks a determination of the constitutionality of the Renegotiation Act *in toto*. If not determined to be invalid *in toto* appellant seeks a determination in respect of Sections 403 (c) (1) and 403 (e) (1) and (e) (2). These sections purport to allow the War Contracts Price Adjustment Board and The Tax Court (both administrative agencies) to assert, determine and collect a claim for money against an individual

without affording him access to the constitutional courts of the United States for the trial of that claim.

Appellees' assert (p. 16) that they have no desire to prevent a decision of this Court as to the constitutionality of the Renegotiation Act.

Since this Court alone can authoratatively determine the constitutionality of the Act, a decision by this Court on those questions would effectively answer all contentions in controversy. If the Act be valid, then appellant must submit to whatever action the War Contracts Price Adjustment Board takes, regardless of its affect upon appellant.

If, however, the present state of the record does not permit this Court to pass upon the constitutionality of the Renegotiation Act, then it is respectfully urged that this court should remand the case to the District Court with direction to enter an order restraining the withholding of appellant's money and collection from appellant's customers until The Tax Court shall have acted upon the petition before it. In this manner appellant will have an opportunity to have the constitutional questions decided by this Court. Such was the prayer in the complaint for alternative relief (Rec. 167).

Notwithstanding the professed desire for a decision as to the constitutionality of the acts, appellees urge that the decree of the District Court should be affirmed because, (a) appellant must exhaust its Tax Court remedy before resorting to the courts, (b) appellant has an adequate remedy at law, and (c) this is a suit against the United States to which the United States has not consented.

Appellees, in asserting these reasons for affirmance have given but little consideration to the statute involved. They have made somewhat general statements as to prematurity of action, exhaustion of administrative remedies, and the

adequacy of legal remedies. But they have ignored those cases cited by appellant which have declared unconstitutional statutes such as the one involved here. This statute authorizes an administrative agency to issue and enforce its command prior to the completion of the administrative procedure by which such command may be modified or annulled. Such a statute violates the Fifth Amendment.

Before considering the cases relied upon by appellees as a basis for affirmance, it is proper to again review briefly (1) the pertinent provisions of the statute here involved, the Renegotiation Act, not statutes generally, and (2) some pertinent facts in this case relative to renegotiation, not different facts in other proceedings.

## THE STATUTE.

(1) The Renegotiation Act was enacted February 25, 1944, almost three months after appellant's fiscal year, to which it is alleged to be applicable, had ended.

(2) Section 403 (a) (4) (A) (Appellees' App. p. 19) contains the so-called definition of "excessive profits" and the factors named which the Board is directed to take into consideration, although not excluding others, which appellees assert is "elaborate and detailed." (Appellees' Brief, p. 3)

(3) The Act becomes effective as to a particular contractor whenever in the opinion of the Board the amounts received or accrued under contracts with the Departments may reflect excessive profits. (Section 403 (c) (1), Appellees' App. p. 27)

(4) After a conference, if no agreement is made with respect to the elimination of excessive profits, the Board may issue an order determining the amount and give

notice thereof to the contractor. Section 403 (c) (1). (Appellees' App., p. 28)

(5) If no petition for determination be filed in The Tax Court within the time allowed by Section (e) (1), such order of the Board "shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency." Section 403 (c) (1). (Appellees' App., p. 28)

(6) Upon the filing of a petition in The Tax Court, "such court (The Tax Court) shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." Section 403 (e) (1). (Appellees' App., p. 37)

(7) The filing of a petition under Section (e) (1) "shall not operate to stay the execution of the order of the Board under subsection (c) (2). Section 403 (e) (1). (Appellees' App., p. 38)

(8) Section (c) (2) (Appellees' App., p. 29) provides for the method of eliminating excessive profits. (Appellees' App., pp. 29, 30)

(9) Section 403 (i) (1) (Appellees' App., p. 41) describes the mandatory exempt contracts and Section 403 (i) (4) (Appellees' App., p. 44) the discretionary exempt contracts.

But no provision of this statute provides for refunds, either principal or interest, if the War Contracts Price Adjustment Board or The Tax Court should be in error either as to the validity of the law or the amount of excessive pofits. Nor is there any provision for a judicial determination or review of the acts of the Administrative agency.

## PERTINENT FACTS.

(1) Appellant's petition for redetermination for the fiscal year 1942 was filed in The Tax Court on May 18, 1944, and is still pending before The Tax Court, but on July 19, 1944, while the petition was pending, $204,000 of funds due appellant from its customers was paid into the Treasury of the United States upon the orders of the Secretary of War because he had expressed an opinion that excessive profits had been realized and had made a unilateral determination of excessive profits upon data received from the contractor and from governmental and other reliable sources, all unknown to appellant except the data which it submitted.

(2) Appellant's petition for redetermination for the fiscal year 1943 was filed in The Tax Court on July 2, 1945, and is still pending, but, except for this proceeding and bond of $100,000 pending this appeal, directions would have been given to appellant's customers to pay an additional $270,000 into the Treasury of the United States, solely because the War Contracts Price Adjustment Board expressed an opinion that excessive profits had been realized and had made an order to that effect, upon data received from the contractor and governmental and other reliable sources, all unknown to appellant except the data which it submitted.

(3) Renegotiation demands are not taxes and the collection of taxes by the sovereign power has always been permitted upon a basis different than that permitted in the ordinary claim for money due.

Appellees' brief discloses their reliance upon three decisions of this Court as the fundamental supports for their argument, *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540; *Coffman* v. *Breeze Corporations*, 323 U.S. 316,

and *United States* v. *Ruzicka*, 67 S. Ct. 207. Each of these decisions will be discussed so that there may be no doubt as to appellant's contention that not one is pertinent to the facts of this case.

The first case which they mention is *Macauley* v. *Waterman S. S. Corporation*, 327 U. S. 540. The fact is that the only similarity between that case and the present one is that each relates in some degree to the Renegotiation Act.

Waterman did not assert that the act was unconstitutional in whole or in part. He sought only a determination that his contracts were outside the provisions of the act. Waterman refused to furnish the Maritime Commission Price Adjustment Board with any data, or to attend any conference with respect to renegotiation. Appellant, however furnished all data requested and attended all conferences. Waterman never filed a petition for redetermination in The Tax Court. In fact, no determination was ever made by the Maritime Price Adjustment Board or elsewhere. No attempt was made to effect collection from Waterman's customers. But in this case the War Contracts Price Adjustment Board did make a determination of excessive profits. Appellant filed its petition for redetermination in The Tax Court after that order had been made. Funds due appellant will be taken (as was done before) while the petition is pending before The Tax Court. The *Waterman* case, as the decision shows, related to the simple proposition that Waterman could not by-pass the Maritime Commission and have its case decided by the District Court on the single proposition that its contracts were not covered by the Act. That was all there was before this Court for determination. It cannot be said that the Waterman Steamship Corporation was subject to any immediate invasion of its property rights. All it had to do was to

submit its data to the Maritime Commission and for aught that appears in the record the Board might have agreed with all its contentions.

In the *Waterman* case the Court was not even required to consider the adequacy of the administrative remedy. It pointed out that the administrative process had scarcely begun. In the instant case, having done all that it could do, the appellant has exhausted its administrative remedy and has demonstrated that such remedy is entirely inadequate to prevent irreparable injury. Having exhausted its administrative remedy and having determined that remedy to be inadequate, appellant turns to the courts of the United States for relief. The situation is the same as that before the court in *Porter* v. *Investors Syndicate*, 286 U. S. 461, and cases cited therein, which appellees ignore.

Appellant in the instant case is not attempting to by-pass any agency. That is apparent from the filing of its petition in The Tax Court. Appellant's experience has shown, and appellees admit that the remedy afforded will be wholly inadequate to protect appellant from the exaction of $270,000. Waterman, attempting to by-pass the agency, without the then possibility of loss, had no such situation to present as that presented here.

In the recent decisions of *United States* v. *Ruzicka*, 67 S. Ct. 207, 211, the Court said:

> "In construing the enforcement provisions of legislation like the Marketing Act, it is important to remember that courts and administrative agencies are collaborative 'instrumentalities of justice', and not business rivals. See *United States* v. *Morgan*, 307 U. S. 183, 191, *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 et seq."

This situation calls for action by the courts as one of the instrumentalities of justice.

In support of their contention that appellant has an adequate remedy at law, by suit against its several customers, appellees rely almost entirely upon the case of *Coffman* v. *Breeze Corporations*, 323 U.S. 316. The decision in that case is directed to the question as to whether the complaint was rightly dismissed for want of equity jurisdiction and for want of a justiciable case or controversy.

Again, appellees have relied upon a decision without any consideration of the nature of the statute or the applicable facts. Had appellant here sued one of its customers without asking for any sum alleged to be due and had it asserted the invalidity of the Renegotiation Act in that suit and had the customer answered that it owed nothing to appellant regardless of the validity or invalidity of the Renegotiation Act, there would have been some comparable facts. In the *Coffman* case, this Court said (p. 321):

> "The answer of appellee Breeze in the present suit denies that it owes any royalties to appellant. It alleges that whether the Royalty Adjustment Act is valid or invalid is a matter which is immaterial to appellee for the reason that it owes appellant no money as royalties or otherwise. In the present suit appellant asks no judgment for the recovery of the royalties alleged to be due from Federal and appellee Breeze. It seeks only an adjudication that the Royalty Adjustment Act and the orders purporting to be made in conformity to it are unconstitutional as applied to appellant, and asks an injunction restraining Breeze and Federal from complying with the Act and the orders by paying any part of the royalties into the Treasury or to any person other than appellant."

It appears that if Breeze and Federal were not indebted to Coffman, and Coffman asked nothing of Breeze and

Federal, the validity of the Royalty Adjustment Act was immaterial. Here the indebtedness due appellant from its customers is admitted and the only basis for failure to pay appellant is the order of the Secretary made pursuant to an invalid statute.

Other facts distinguishing the *Coffman* case from the instant one are:

(1) The Royalty Adjustment Act, in terms, authorized the patent owner to sue in the Court of Claims, if he feels aggrieved by the determination of the agency. The Renegotiation Act not only fails to authorize such suit but in terms preclude such a suit. Sections (c) (2) and (e) (1) and (e) (2) provide that no court or other agency shall disturb the findings of the Board or the Secretary or the Tax Court.

(2) Federal Laboratories, Inc. was one of the defendants and was owned by Breeze Corporations, Inc. Coffman had previously sued Federal in the United States District Court for New Jersey, so there was no possibility of disturbance of customer relationship as in the present case.

(3) "Appellant does not in the present suit," said the Court in the *Coffman case*, 322 U.S. 316, 322, "bring to our attention any facts showing or tending to show that a suit to recover a money judgment for the royalties would not afford complete and adequate relief without resort to an equitable remedy." That is not true in this case. Here in addition to the fact that no form of judicial review is provided, it is alleged that if appellant were compelled to sue its customers it will destroy the relationship of business established by appellant. *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Columbia System* v. *United States*, 316 U. S. 407. In the *Coffman* case, Coffman had already sued both of his customers. Further-

more they were his licensees, not customers as that word applies to purchasers from appellant.

(4) The complaint did not allege in the *Coffman* case that if the injunction did not issue the Breeze Corporations would pay the money into the Treasury. Exactly the reverse is true of this case.

(5) In *Coffman* v. *Breeze,* it was pointed out that the question of the constitutionality of the act was not raised in the suit pending in the United States District Court for New Jersey and that the appellant was merely seeking an advisory opinion in the equity action for use in the lawsuit in New Jersey. Here appellant seeks no advisory opinion for any subsequent lawsuit, and desires only to protect itself from illegal exactions.

(6) Finally, in *Coffman* v. *Breeze,* the action of the Secretary was not challenged as *an act of wrongdoing of the Secretary.* He was not a party to the action. The case of *Coffman* v. *Breeze* does not call into question whether the Secretary must answer for his own wrongdoing. It will not be denied that if the action of the Board in this case is wanting in constitutionality, its members and the Secretary of War or his delegate are engaged in tortious conduct. The principle that no one has the right to cause another to break his contract with a third party is as old as *Lumley* v. *Gye,* (1853) 2 El. & Bl. 216. It has been reiterated so frequently that no citation of authority is necessary. The notion that a wrongdoer may not be required to answer for his wrongdoing because one who he has injured may have a remedy against someone else has never been decided by our courts. Indeed, the short answer to that proposition is that this Court has decided that if one is:

" . . . sued for conduct harmful to plaintiff his only shield is a constitutional rule of law that exonerates him." *Brady* v. *Roosevelt S.S. Co.,* 317 U.S. 575, 584, quoting

from *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 258 U. S. 549, 567.

What we have said we think sufficiently disposes of the contentions made by appellees in respect of *Coffman* v. *Breeze*, on which they rely.

Appellees also contend that the recently decided case of *United States* v. *Ruzicka*, 67 S. Ct. 207, is authority for the proposition that the Secretary may direct customers of appellant to pay into the Treasury of the United States, the amount of "excessive profits" determined by the War Contracts Price Adjustment Board, prior to any hearing in The Tax Court. It is also contended that under that decision the equity courts of the United States do not possess the jurisdiction or the power to prevent such action.

Had appellees given more careful consideration to the Ruzicka decision, they would have ascertained that the case supports no such contention. In reaching the decision the Court said:

> "Certainly the recent growth of administrative law counsels against generalizations regarding what is compendiously called judicial review of administrative action. And so we deem it desirable, in a case like this, to hug the shore of the precise problem before us in relation to the provisions of the particular Act immediately relevant. One general observation, may, however, be permitted. Both courts and administrative bodies are law-enforcing agencies, utilized by Congress as such. In construing the enforcement provisions of legislation like the Marketing Act, it is important to remember that courts and administrative agencies are collaborative 'instrumentalities of justice', and not business rivals. See *United States* v. *Morgan*, 307 U. S. 183, 191; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141 et seq. And so we are not called upon to decide what powers inhere in a court of equity, exercising due judicial discretion, even in a suit such

> as was here brought by the United States for the enforcement of an order under Sec. 8a. We say this because it appears that at a stage in the proceedings in the district court a motion for a stay, pending disposition of the petition by the Ruzickas before the Secretary of Agriculture, was made by the respondents. With the court's leave, this motion was subsequently withdrawn. The power of the district court to have acted on it is therefore not before us. *Compare Scripps Howard Radio* v. *Comm'n*, 316 U. S. 4; *Hecht Co.* v. *Bowles*, 321 U. S. 321."

If ever a court confined its decision to "precise problems" before it, in "relation to the provisions of the particular act", this Court did in the Ruzicka case. It therefore becomes of greater importance than ever to consider the particular act then before the Court so that there will be no unwarranted extension of that decision.

The act before the Court was Agricultural Marketing Act of 1937.

The question before the Court as stated by the Court at page 208, was:

> "Thus the question before us is whether a handler may resist a claim against him by the Secretary of Agriculture, made according to the procedure defined in the Act, without previously having sought to challenge the claim in a proceeding, also defined in the Act, before the Secretary of Agriculture."

Has there been even a suggestion that appellant here, has not previously challenged the claim asserted against it in the manner, in the time, and before the agency designated by the Act itself? Ruzicka could have filed a petition with the Secretary. This he failed or refused to do. Appellant here has filed its petition. In addition, either Ruzicka might have obtained in the District Court complete redress of any injury he might sustain if the order of the Secretary was erroneous.

Ruzicka, under the provisions of Section 8c (15) of that act, might have filed a bill in equity to review the ruling of the Secretary, and if it be determined that such ruling was not in accordance with law, the District Court would be compelled to remand such proceedings to the Secretary with directions either (1) to make such ruling as the District Court might determine to be in accordance with law, or (2) to take such further proceedings, as in its opinion, the law requires. Ruzicka could by the simple process of filing a petition in the District Court have secured a decision of a court on the merits of his claim. It is further provided in subsection 8c (15) that "any proceedings brought pursuant to Section 8a (6) (the enforcement proceedings) shall abate whenever a final decree had been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to subsection (15)." (The parenthesis and words within it have been added by us.)

No such rights are accorded by the Renegotiation Act. They are expressly denied. The Ruzicka case differs from this case in that Ruzicka had a right to not one, but two days in a constitutional court. Here the appellees are urging that appellant has no right to any day in a constitutional court.

There is another important difference between the Ruzicka case and this case.

Ruzicka was in the milk business which is governed by a comprehensive scheme of marketing provided by statute affecting producers, handlers, and the public. Any delay in meeting obligations imposed by statute would affect the entire industry indirectly and the producers directly. If all handlers did not contribute to the fund in the amounts required by the statute, no producer could obtain the amount of money to which he was

justly entitled. In its opinion the Court said: "Handlers are thus assured opportunity to establish claims of grievances while steps for the protection of the industry as a whole may go forward." There is nothing new in the doctrine that individual rights must in certain situations give way to the public good. This is the principal upon which buildings may be destroyed in a conflagration, trees may be destroyed to preserve the health of other trees, people may be vaccinated to preserve the health of society, prices may be stabilized to effectuate the general welfare.

But here no other individual could be affected by staying the mandate of the War Contracts Price Adjustment Board, until The Tax Court has acted, and an opportunity afforded for a determination of the validity of the law.

Finally, the Ruzicka case differs from this case in that although Ruzicka had applied to the court for a stay, pending disposition of his petition before the Secretary of Agriculture, his motion for a stay was later withdrawn. What we are asking here, in part, is that the order of the War Contracts Price Adjustment Board be stayed at least until The Tax Court shall have had adequate opportunity to make its redetermination. Appellees resist this proposal. They want no interference from any court. They apparently do not regard the courts and administrative agencies as "collaborative instrumentalities of justice." That doctrine announced in *United States* v. *Morgan*, 307 U. S. 183, 191; *Federal Communications Comm.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141 and in the Ruzicka case is not in harmony with their ideas of arbitrary power.

Appellees apparently wish to extend the doctrine of the Ruzicka case to make it possible to do that which was

done with the sanction of a court to situations where such power may be exerted without such sanction.

The foregoing discussion of the Macauley, Coffman and Ruzicka cases sufficiently demonstrate their inapplicability to the various propositions for which they have been cited by appellees under their discussion of their points 3, 4, 5, 6, and 7 (brief, pages 20 to 32).

Other propositions advanced in appellees' brief will now be discussed in order.

## I.

## EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Appellees' position in this respect cannot be supported by any precedent in Anglo-American law. Appellees scarcely try, but, in generalities, endeavor to sustain this amazing attempt to justify their conduct by relying on the doctrine of "exhaustion of administrative remedies." Their position is that appellant cannot question their act now since appellant will, at some later date, be entitled to a hearing in The Tax Court, which does not have power to direct repayment. In fact, it has no power except to redetermine the amount of excessive profits.

Appellees have not only misconstrued the exhaustion doctrine, as announced by the decision of this Court, but they would have this Court validate arbitrary action.

The exhaustion doctrine is not without limits. In many factual situations where its applications would seem probable, it has been limited by this Court, when it would lead to an unconstitutional result. Such would occur here.

In *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, the telephone company sought relief by injunction against an order of the Department of Public Works of the State of Washington prescribing maximum rates and charges on the

grounds that the commission's rates did not afford the company an adequate return. A state statute permitted an appeal to the state courts, but pending such appeal no stay of the commission's order was allowed. This court, in granting the injunction, observed, at page 201:

> "It is apparent from these provisions that, after the Commission finally denied the increase of rates applied for, the company had exhausted its administrative remedy to avoid the alleged confiscatory rates under which it was compelled to render the service. It had, therefore, no recourse but to a court. Both by reason of diverse citizenship and because of the federal constitutional question the federal court of equity was available to it. The state statute forbidding a stay of proceedings until a final judicial decree was rendered, of course, could not prevent a federal court of equity from affording such temporary relief by injunction as the principles of equity procedure required. The conditions set out in the bill, therefore, seem to have made a case ripe for federal relief. *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134; *Prendergast* v. *New York Tel. Co.*, 262 U. S. 43, 48.
>
> "But it is urged that such relief is premature because the rates, increase of which was refused, were reasonable, and afforded an adequate return on the value of the property of the company used in the public service as fixed by the Commission in accord with the statutory procedure for that purpose, and that the company still has a right to appeal from the valuation of the Commission to the Superior and Supreme Courts on the legislative question of that valuation."
>
> (p. 203.)
>
> "It is thus apparent that the contention of the Department and the state authorities that the company has not exhausted its remedy • • • is correct."
>
> (pp. 204-205.)
>
> "It has done all it can to get relief and cannot get it. • • • there was no chance for a stay. • • •

"Under such circumstances comity yields to constitutional right, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a federal court of equity from suspending the daily confiscation, if it finds the case to justify it. *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 200, 293."

This case, holds that if petitioner is or will be irreparably injured pending the administrative process, equity will afford him an injunction regardless of the exhaustion doctrine.

Appellees avoid discussion of the facts of the present case. Those facts lead directly to *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, and *Porter* v. *Investors Syndicate*, 286 U. S. 461. The Secretary of War is bound by the Constitution of the United States as was the State of Washington. When one is being irreparably injured and can obtain no relief in the administrative process, equity will protect his property pending the completion of the administrative act and a judicial determination as to the legality of the administrative authority, a determination which can only finally be made by this court.

In the case of *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, discussed pp. 106-107 of our original brief, there was no danger that property would be taken, funds withdrawn, or working capital impaired. In fact, any order of the agency was without any legal significance to Bethlehem until it had been affirmed by the Circuit Court of Appeals. But in the instant case, appellees say there must be no court hearing.

Appellees attempt to buttress their position by resort to tax cases, although it is conceded that this case is not a tax case. They cite (brief, p. 24) *Phillips* v. *Commissioner*, 283 U. S. 589. There a deficiency assessment was made by

the Commissioner against a taxpayer. He appealed to the Board of Tax Appeals and from there to the Circuit Court of Appeals. This court granted certiorari. His specific objections were that he was required to file a bond and that the Board's determination of facts was to be treated as final. Although the decision is silent, it may be inferred that the tax in question was not paid prior to the decision of this Court. The court makes it clear there, as is provided by statute, that an appeal from an adverse ruling to the Board of Tax Appeals (now The Tax Court) stays the collection of the taxes, and, upon filing of a bond after the decision of The Tax Court, no collection can be made until review of that agency's determination is made by the Circuit Court of Appeals.

The *Phillips* case shows clearly how a taxpayer is protected. Though the collection of taxes is always more summary in character than any other proceedings, except perhaps custom duties, a taxpayer cannot be injured, except in cases of fraud or jeopardy, until the administrative process is complete. This is not true of the renegotiation acts.

(1) Under this subparagraph of their brief, appellees argue that even if there is no provision in the law for refunds, such is implicit in the law itself. Their authority is Congressman Disney's statement in the congressional debates (Appellee's brief, p. 19). If Mr. Disney's determination of that question of law is to be regarded as conclusive or even persuasive, it should not be doubted that the remainder of his utterances on questions of law should also be persuasive. He said also (89 Cong. Rec. 9930):

> "So I am convinced in my own mind, as I believe is every other lawyer in this House that the retroactive application of the renegotiation law is an act of repudiation and hence unconstitutional."

The fact is, the Renegotiation Act contains no provision for refunds. Nor does appellant now know whether an appropriation will be made in the event that the present one expires before it could be employed to give relief to appellant. The language in the appropriation act (p. 20 Appellees' brief) which refers to refunds limits them to such instances "as may be adjudged or determined to be owing in law or equity". We do not desire to attribute to Congress the making of a futile appropriation. But to avoid this, it may be concluded that Congress never intended that The Tax Court should have exclusive jurisdiction of any matter other than the amount of the determination of excessive profits, leaving to courts the determination of questions of law.

It is also clear that no refund may be made except on certification of the War Contracts Price Adjustment Board. This creates another hurdle before appellant can obtain its money even if the appropriation had not expired.

Thus the relief which appellees state is available to appellant is so uncertain as to constitute no real relief.

(2) The Renegotiation Act contains no provision for adequate interest. The Third Deficiency Appropriation Act provides for the payment of 4% per annum. The demand for payment is for the amount plus 6% per annum. The Third Deficiency Appropriation expires in 1947. Appellants' 1942 case is No. 9 of the Renegotiation cases, filed May 18, 1944. Appellants' 1943 case is No. 228R of Renegotiation cases, filed July 2, 1945. Both are still pending on the petition and the answer thereto.

(3), (4), (5), (6), (7). (Appellees' Brief, pp. 21-32.) Under these numbers appellees discuss generally the absence of judicial review, multiplicity, payment in advance of administrative remedy, initiation of proceedings in The Tax Court being inadequate to justify resort to a court of

equity, and the insufficiency of the allegation of unconstitutionality. The authority in each instance is one or more of three cases, *Coffman* v. *Breeze*, 323 U. S. 316; *Macauley* v. *Waterman Corp.*, 327 U. S. 540, and *United States* v. *Ruzicka*, 67 S. Ct. 207, previously analyzed. This analysis shows their inapplicability to the case at bar.

(8) Under this section appellees argue that the act is not unconstitutional in toto.

Appellees refer to a number of cases where the delegation was upheld as being sufficiently definite. With those cases and those standards appellants have no complaint. In each there was a degree of definiteness of standards lacking in the Renegotiation Act. The interesting part of appellees' position is the statement:

> "The cases on which appellant apparently relies (Br., pp. 43-51) are not concerned with delegation of legislative power but with the definiteness of statutory language, unimplemented by any administrative action, as a standard for unlawful conduct."

In *Schechter Corp.* v. *United States*, 295 U. S. 495, discussing delegated power, the Court said:

> "Those who act under those grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary."

Appellant does not contend that administrative agencies by implementing statutory language have no place in administrative law. But the cases cited by appellant in its original brief are not all wanting in administrative implementation. It was not so in *Standard Chemical & M. Corp.* v. *Waugh Chemical Corp.*, 231 N. Y. 51, 131 N. E. 566. Nor was this true in *Small Co.* v. *Am. Sugar Ref. Co.*, 167 U. S. 233. On the contrary, there had been administrative implementation in each of these cases.

In the *Waugh* case the President of the United States had fixed the price of oleum. In the *Small Co.* case the President had fixed one cent per pound as prima facie reasonable profit on sugar.

The crucial point is whether the Congress has created a framework within which the agency may effectuate the purpose or policy of an act of Congress. In *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 216, the Court said:

> The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the 'public interest, convenience, or necessity,' a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.' *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 138. 'This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power.' Compare *New York Central Securities Co.* v. *United States,* 287 U. S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services . . .' *Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266, 285."

This Court has frequently used the word "canalization", to describe the necessary specificity. It has also repeatedly said that the Congress must give sufficient specificity in its exactments, so that "Congress, the courts and the public" may be able to ascertain whether the agency had kept within the Congressional mandate.

When Congress hands its power to an administrative agency, knowing that the administration of the Act is left to the "judgment of the man handling the job," there is no framework, no canalization, no limits by which Congress, the courts and the public can know whether it has kept

within the mandate. The congressional history of the Renegotiation Act shows that just that was done in this case. The doctrine of implementation cannot be applied unless there is something to implement.

The case of *Waite* v. *Macy*, 246 U. S. 606, brings the problem into relief. There Congress outlined the policy to exclude poisonuous or impre tea. The administrative agency implemented the policy with pots of standard teas. The agency excluded a certain tea for failing to meet the requirements, as it contended, of the teas in the standard pots. The Court held that the agency had not kept within the Congressional mandate in excluding the tea in question. It would be impossible here to make a determination as to whether the agency had kept within the Congressional mandate, as was possible in *Waite* v. *Macy* under these acts. That is one reason they are unconstitutional.

On the subject of retroactivity appellees say (Brief p. 34):

> "Even more clearly, appellant's contentions as to the unconstitutionality of the statute when retroactively applied would not make the law entirely void: there would be ample room for prospective operation."

If the retroactive features of the Renegotiation Act be declared unconstitutional, there is no need to consider whether the prospective feature would be unconstitutional and this Court would not in this case consider that interesting but then immaterial question. We have here a statute which was passed February 25, 1944, pursuant to which appellant was "renegotiated" for its fiscal year ended November 30, 1943. If the act is void because of retroactive features which, in terms, authorize the "renegotiation" of any subcontractor, whose fiscal year ends subsequent to June 30, 1943, there certainly is no need to con-

sider in this case whether the prospective features of the act are constitutional.

However, it is not unreasonable to suppose that if the retroactive features of the Act are in themselves unconstitutional they render the entire Act unconstitutional. This is so because the very sections of the Act are so intermingled one can not stand and the other fall.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, the Court said:

> "These two sets of requirements are not like a collection of bricks, some of which may be taken away without disturbing the others, but rather like the interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole."

Appellees contend that since appellant has the right to a hearing in the Tax Court and from there has an appeal to the Circuit Court of Appeals together with a further right to petition this Court for a final review, the remedies available to it preclude the issuance of an injunction by the District Court.

This contention is untenable. If, as was said in the case of *Addison* v. *Holly Hill Co.*, 322, U. S. 607, at page 616:

> "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested"

it may be said with greater force that the constitutionality of an act cannot be left to the decision of those designated to exercise the power granted by the act itself.

The doctrine of exhaustion of administrative remedies is only an expression of the ancient principle of equity that no one may invoke its powers until he has been injured or until injury is impending. When such injury is clear, then the argument that further administrative proceedings

are available is no answer if that procedure does not and cannot prevent the damage. This is the teaching of the *Kuykendall* case and *Porter* v. *Investors Syndicate,* 286 U. S. 581.

So appellant concludes that inasmuch as it is about to be injured and the only excuse given by appellees for that injury is an Act of Congress, appellant must surely have a right to a determination by a court of the constitutionality of the act before the injury is inflicted. This leads to one of two results, either the District Court should have passed upon the constitutionality of the act, *Pennsylvania* v. *West Virginia,* 262 U. S. 553; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *Euclid* v. *Ambler Co.,* 272 U.S. 365; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *St. Louis & R. Co.* v. *Public Comm'n,* 279 U. S. 560; *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300, or at least it should have stayed the hand of the War Contracts Price Adjustment Board in its efforts to collect appellant's funds until The Tax Court reached a decision on the petition now pending before it.

## II.

## ADEQUACY OF REMEDY AT LAW.

Under this point appellees assert that appellant has an adequate remedy at law and advance the *Waterman* and *Coffman* cases as their authority.

The availability at law of a plain, adequate and complete remedy is conceded fatal to the right of injunctive relief. But is the right of appellant to sue its customers a plain, adequate and complete remedy?

The answer is No. Why should appellant be required to sue its customers to determine whether the War Contracts Price Adjustment Board or the Secretary of War acted

in a legal manner? (See pages 10-11 hereof.) Assume that such suits were instituted in the several jurisdictions as required. In those proceedings what issue or issues are presented? Appellees concede that the constitutionality of the statute could be determined in that suit. But that is not the only issue. In such a suit appellant would have but a half day in court, since he must accept for the purpose of that suit the determination of the War Contracts Price Adjustment Board. But the determination of the Board is not final. The amount, at least, can be finally fixed only by The Tax Court, and The Tax Court has not acted.

If, in those suits, the act be determined to be constitutional, then the payments have been irrevocably made. Subsequently The Tax Court might well decide that there were no excessive profits or only a fraction of the amount determined by the Board. Does appellant then have an immediate right to repayment? The Third Deficiency Appropriation Act does not so provide. There may not even be an appropriation when The Tax Court acts. But one thing is certain: the Renegotiation Act is silent as to repayment. Does appellant then have the right to sue again the customer for an additional sum or would the prior judgment operate as an effective bar to such second suit?

Furthermore, all the appropriation acts appropriating money to make renegotiation refunds limit the use of such appropriations "as may be adjudged or determined to be owing in law or equity." In using these words "in law or equity," the Congress may have implied the right to court action since the determination of an administrative body could scarcely be said to be "in law or equity." Again, the Congress may have meant, in making these appropriations, to refer only to such refunds as may become due by reason of suits instituted by subcontractors

against contractors, or refunds found to be due by reason of a court decision in suits instituted by the Government in constitutional courts authorized under Section (c) (2) of the Act.

The fallacy in the whole argument regarding suits against customers is that such suits will be maintained or defended upon a theory that the amount sought is fixed and definite, and yet throughout their brief, appellees assert that The Tax Court has exclusive and final jurisdiction to determine the amount. All the while The Tax Court has not yet made its determination of that amount.

Appellees rely upon *Spaulding* v. *Douglas Aircraft Co.*, 154 F. (2d) 419, as authority for the proposition that the right to sue customers is fatal to the procedure adopted here. But Spaulding obviously had no other course to pursue. In that opinion it is said at page 426:

> "Though appellants, whose excessive profits had been determined by the Secretary on February 2, 1944, had ninety days from February 25, 1944, to seek such redetermination, they did not do so but instead, on August 11, 1944, filed the instant suit in the District Court. They are thereby in a position analogous to that of a taxpayer who has failed to initiate his proceeding for redetermination of a tax deficiency within ninety days after he has received the Commissioner's deficiency letter. As stated by the Supreme Court in *Utley* v. *St. Petersburg*, 292 U. S. 106, 109, 54 S. Ct. 593, 595, 78 L. Ed. 1155:
>
> 'This court will not listen to an objection that the charge has been laid in an arbitrary manner when an administrative remedy for the correction of defects or inequalities has been given by the statute and ignored by the objector.' "

Spaulding having failed to file a petition in The Tax Court within the time provided, the determination of the

Secretary was final and no change could have been made in the amount. Having failed to file a petition in The Tax Court, Spaulding was in no position to say to an equity court, "I have done everything to protect myself from injury that I can under the statute. I have done it at the time and in the manner provided, but I am still going to sustain an irreparable injury, if you do not aid me." That is appellant's position here.

It is also to be noted that the Court in the *Spaulding* case said, at page 423:

> "Appellants, with the burden of proof, do not allege that any of the 1942 contracts from which the excessive profits were realized were entered into prior to its enactment."

But here appellant alleged that $2,780,009.82 of a total sales in 1943 of $3,548,845.50 resulted from contracts entered into prior to April 28, 1942, when the first act was passed. Every dollar of appellant's sales in 1943 was made prior to the enactment of the Renegotiation Act (February 25, 1944). Should it be determined that such sales were not subject to renegotiation the prior determination of excessive profits made by the Board would be set aside completely or substantially reduced, even if the second act be constitutional. The uncertainty of the *amount* of excessive profits until after The Tax Court has acted illustrates the futility of suits against customers.

Is this remedy then, which requires one or possibly two suits against the customer, or one suit and an unknown procedure for refund, as plain, as adequate and as complete as an injunction which will stay collection until the Tax Court shall have acted?

In any event, we have never contended that we could not sue our customers. If we have a right to sue them, it does not excuse the persons sued by us from their

wrongdoing, because we do have such a right. Their wrongful act may not be condoned because we have this dubious right.

It is also asserted by appellees that collections will be made from only two or possibly three customers of appellant. The Renegotiation Act does not so limit the action of the War Contracts Price Adjustment Board. Because collection was made in 1944 for the year 1942 from two customers it does not follow that such will happen again. If the Secretary of War can direct two, possibly three customers to pay, he can do the same without regard to the numbers.

## III.

## THIS IS NOT A SUIT AGAINST THE UNITED STATES.

Appellees assert that this is a suit against the United States; that because the United States cannot be sued without its consent, and because it has not so consented, the action must be dismissed.

Before discussing cases cited by appellee, it must be observed that the nature of the proceedings is the true test in respect of whether the Government is actually a party litigant. *Ex parte State of New York*, No. 1, 256 U.S. 490, 500.

This case is unlike the case of *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371, where the nature of the suit was to collect a claim against the Government by enjoining the Secretary of the Navy from taking such action as would stop payment by the Government of Mine Safety's claim. This he could do only as Secretary of the Navy and not as an individual. This Court properly said that the suit was actually one against the United States.

In the case of *Minnesota* v. *Hitchcock*, 185 U. S. 373, the United States owned land, title to which was claimed by the State of Minnesota. The action was brought to enjoin the Secretary of the Interior from selling the land. A decree enjoining him from doing so would impliedly determine that the lands belonged to the State. The court found that the United States had consented to be sued. In that case, of course, Hitchcock, the Secretary of the Interior, was sued in his capacity as Secretary of the Interior and Commissioner of the General Land Office. It was not claimed that Hitchcock personally was doing any act pursuant to a void statute. On the contrary, it was claimed that he was acting for the United States. It is not to be wondered that under the circumstances the action was deemed to be one against the United States.

In *Louisiana* v. *McAdoo*, 234 U. S. 627, the State of Louisiana sought to obtain permission to sue the Secretary of the Treasury to compel him to adopt a construction of the tariff laws which was different from that he had adopted. Without going into the merits of its contention, this Court held that if the prayer of the petition should be allowed, the court would be permitting a suit against the United States.

The Court said (p. 632):

> "Obviously such suits to review the official action of the Secretary of the Treasury in the exercise of his judgment as to the rate which should be exacted under his construction of the Tariff Acts would operate to disturb the whole revenue system of the Government and affect the revenues which would arise therefrom. Such suits would, obviously, in effect, be suits against the United States."

In *Belknap* v. *Schild*, 161 U. S. 10, a bill was filed for an infringement of a patent. It appeared that some of

the defendants were officers of the United States Navy which had used and were using a caisson gate, which was said to infringe plaintiff's patent.

The Court said (p. 25):

> "If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States."

The prayer of the bill asked that the defendants be enjoined from using the gates already installed and that they be destroyed. Obviously this was a suit against the United States.

We do not assert that the parties named in a complaint determine the question of whether a suit is one against the United States. But so far as we are aware, it has never been doubted that where one invaded the property rights of another, he may not justify his conduct by virtue of an enactment of the Congress which is unconstitutional.

In *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620, this Court said:

> "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

Here, as there, the authority of the individuals is challenged to do the things of which the complaint is made. This suit rests upon the charge of lack of power.

Would it seriously be contended that the conduct of the individuals who are members of the purported War Contracts Price Adjustment Board or the individuals who are Secretary of War and Under Secretary of War,

is legal and proper except for the acts? If the acts be unconstitutional, could it be said that the acts justified them in their conduct? This court has answered "No" to these questions many times.

The court said, in *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620:

> "And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 843, 868; *Davis* v. *Gray*, 16 Wall. 203; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10; *Scott* v. *Donald*, 165 U. S. 107, 112; *Smyth* v. *Ames*, 169 U.S. 466; *Ex parte Young*, 209 U. S. 123, 159, 160; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *Herndon* v. *C., R. I. & P. Ry. Co.*, 218 U. S. 135, 155; *Hopkins* v. *Clemson College*, 221 U. S. 636, 643-645. And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 171, 172; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94."

It was said in *Ickes* v. *Fox, et al.*, 300 U.S. 82, pp. 96, 97:

> "The suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessors in office. That such suits may be maintained without the presence of the United States has been established by many decisions of this court, of which the following are examples: *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165, 171-2, 176; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619; *Goltra* v. *Weeks*, 271 U. S. 536, 544; *Work* v. *Louisiana*, 269 U. S. 250, 254; *Payne* v. *Central Pacific Ry. Co.*, 255 U. S. 228,

238. These decisions cite other cases to the same effect.

The appellees suggest (Appellees' Brief, p. 43) that the appellant is requesting that the appellees be enjoined from suing appellant in a court. No justification may be found in the record for this statement. It is suggested also that, because the United States would necessarily be a party to such a suit, if instituted, that makes this proceedings a suit against the United States. This of course, begs the question of whether the United States could maintain such a suit relying upon an unconstitutional statute, as this is averred to be. It is one thing to enjoin an officer of the United States from doing an act in his official capacity and quite another to enjoin the individual who happens to be an officer from doing an act which he cannot justify as an official. It is one thing to require payment of money from the Treasury of the United States and quite another to resist payment to the Treasury of the United States.

We quite agree that if the money had been collected and were in the Treasury of the United States, and we sought repayment thereof, this case would have been like the *Mine-Safety Appliances* case. The point is that such is not the fact. It was for this reason that we carefully avoided asking for payment of the $204,000 already, illegally paid into the Treasury of the United States.

It is for this reason that appellant carefully averred that it has no contracts with the United States and that no money is now due to it from the United States; and, that the money in question is money owed to appellant from customers other than the United States.

As we understand the doctrine of *Ford Co.* v. *Dept. of Treasury*, 323 U. S. 459, the court held that a taxpayer could not bring a suit in a Federal Court against the

State of Indiana which had consented to be sued in its own courts. This would be in violation of the 11th Amendment. That case has no applicability to support the proposition that Congress has sought to bar jurisdiction of District Courts to forbid unconstitutional exactions on an individual pending the issuance of the final command of the administrative body chosen by statute to make such final command.

## IV.

(A) On page 33 of their brief, appellees refer to the case of *Hirabayshi* v. *U. S.* 320 U. S. 81, which was quoted in part in *Spaulding* v. *Douglas*, 154 Fed. (2d) 419. Advancing this case as their authority, they contend that the amendment passed October 21, 1942, to the first renegotiation act (April 28, 1942) effected an adoption by the Congress of the factors then being used by the War Department in the determination of "excessive profits." Whether or not such result follows is immaterial in a consideration of the Renegotiation Act (February 25, 1944) since, in that act, Congress specifically enumerated certain factors to be considered, not excluding others, for the determination of excessive profits.

Since appellant alleges that the first act (April 28, 1942), with all amendments thereto prior to February 25, 1944, is unconstitutional (Rec. p. 153, Par. 24; p. 159, Par. 40) if construed to give the right to the Secretary to make a determination of excessive profits in the absence of any agreement with the contractor, consideration must be given to appellees' position. This Court decided in the *Hirabayshi* case that the subsequent enactment by Congress of a law, at a time when Lt. Gen. DeWitt's orders were before it, operated as an adoption of the military regulations so issued by that commander.

On October 21, 1942, when the amendment to the first renegotiation act was passed, there were three agencies renegotiating war contracts, the Navy, the Army and the Maritime Commission. The factors of the three agencies were not the same. To say that the passage of the amendment adopted the War Department's factors under these circumstances ignores the principle of the *Hirabayshi* case since there could be no selection of War Department's factors to the exclusion of others then being used.

On October 21, 1942, at the time of the adoption of the amendment the Congress also had before it the War Department's administrative construction of the Act as made by appellee Patterson, then Under Secretary of War, in charge of renegotiation for the War Department, to the effect that renegotiation implied "agreement, mutual agreement", between the contractor and the Secretary. It may be said that under the doctrine of the *Hirabayshi* case the Congress adopted, in amending the act, the administrative interpretation of Mr. Patterson. Such an interpretation precludes the making of a unilateral determination. Accordingly, there is no point in discussing the "factors" which Congress may have adopted. Nothing could have been done under the first act without appellant's agreement. It made no agreement.

But, if it be assumed that the Congress by the amendment of October 21, 1942, did not adopt Mr. Patterson's construction, and, if it also be assumed that by the amendment of October 21, 1942, the Congress, without so stating, adopted the War Department's factors, to the exclusion of those of the Navy or the Maritime Commission, the fact still remains that the factors so adopted in that manner are too indefinite and too uncertain as to satisfy the rule of standards applicable to delegated authority.

Appellees assert (p. 40 of their brief) that if the Government brought suit against the appellants to collect sums

determined to be excessive war profits, appellant clearly would have an adequate remedy at law. The obvious answer to this is that appellant has no control over the institution of suit by the Department of Justice on behalf of the Government. It is not an adequate remedy at law of which appellant could avail himself. But if such an action had been instituted by the Government, the appellant would have had no opportunity to resist the demand for excessive profits which were then and now undetermined, in view of the fact that the Tax Court, which has exclusive right to determine the amount of excessive profits in this case, had not and has not acted. All that has been said heretofore relative to suits against customers, prior to the action of the Tax Court, applies with equal force to suits by the United States.

## CONCLUSION

The appellees have elected to avoid a consideration of the Constitutional questions discussed in appellant's original brief except in a fragmentary fashion, which are fully answered in this brief. They have elected to stand on the procedural questions involved.

In its amended and supplemental complaint, appellant prayed that an interlocutory injunction issue and that upon a hearing a permanent injunction issue upon the allegations that the Renegotiation Act was wholly void. In the alternative, appellant prayed that an injunction issue pending a redetermination by The Tax Court, for the reason that insofar as the Section (e) (1) of the Renegotiation Act authorizes the collection of "excessive profits" as determined by the War Contracts Price Adjustment Board, before The Tax Court has acted, it was violative of the due process clause of the Fifth Amendment. Under the general relief clause, appellant's contention is that, if the first act as now interpreted by the Secretaries, authorizing them

to issue unilateral orders determining excessive profits, is unconstitutional, as appellant alleged it to be, then a court of equity might and should diminish the amount, if any, due under the second act, by the amount already illegally collected under the first act.

We have established that the appellant is about to be irreparably injured by the unlawful acts of the persons who are members of the War Contracts Price Adjustment Board and the persons who are the Secretary of War and Under Secretary of War. We have established that the acts are wholly unconstitutional, and should be so declared.

If, however, the record now does not permit such action then this Court should, we contend, remand the case to the District Court, to enjoin the appellees in their purpose to collect from appellant's customers, until The Tax Court shall have acted.

We make no contention that the government was without power to draft every plant in America to successfully prosecute a war. Congress elected not to exert this power. It elected to attain its goals in matters of procurement by other methods. Having done so, it is no answer to the propositions we have advanced that we were engaged in a war.

Congress is not invested with the power to wage war in an unconstitutional manner.

Respectfully submitted,

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